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No. 80-517

In the Supreme Court of the United States

OCTOBER TERM, 1980

JUNEAU SQUARE CORP., et al.,

Petitioners,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. REPLY TO "COUNTERSTATEMENT OF FACTS".

Respondents First Wisconsin defendants and Marshall-Michigan ("FW/MM") seek to discourage review of this case by flagrantly misstating the record.

The conspiracy among the First Wisconsin companies and NML to control the supply of office space onto the market[1] was established by voluminous evidence (e.g., App. 263-4) and confirmed by the court of appeals (App. 4).

[1] FW/MMs' contention all acts specifically aimed at plaintiffs were done by conspirators other than NML is a strawman. The First Wisconsin companies, NML and others conspired *to restrain trade*. All such conspirators need not be aware of or participate in each act to further the aims of the conspiracy. *T.V. Signal Co. of Aberdeen v. A.T. & T. Co.*, 462 F. 2d 1256 (8th Cir. 1972).

FW/MMs' history of Juneau Square consists of half truths and errors.[2] The true facts were faily described by the trial court (App. 54-56) and the court of appeals (App. 2-4). The Juneau Square developers did not have or pretend to have a deep pocket. Their project was viable, but vulnerable because it needed long term financing.[3] Realiz-

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[2] E.g., plaintiffs were not "forced to sell off" 50% of the project; Marshall-Michigan approached the plaintiffs unsolicited. If FW/MMs' version of the project remotely approached the truth, Marshall-Michigan's $1,000,000.00 cash investment would have been unthinkable. Also, Juneau Square Corp. did not sell 75% of the project "while remaining obligated to pay 50% of the Aetna mortgage and 100% of the remaining debts." The sales were *sale and leasebacks* (with options to repurchase) under which Juneau Square Corp. made fixed payments to the investors and got *all* remaining income from the project. The "remaining debts" were mainly loans made by the owners of Juneau Square Corp. The exhibits reprinted in FW/MMs' appendix (at 1-4) were impeached. The trial judge commented that the exhibits had been "eroded" on cross examination, "particularly 419." They erroneously treat depreciation as a cash loss and a real loss in value of real estate. Correcting for such errors established a positive book value of over $1.2 million and an actual value of several million more because of *appreciation* in market value of the real estate.

[3] FW/MMs' statements plaintiffs approached "20 or 30" firms for financing are another distortion. Until the Aetna declination of March 11, 1969, plaintiffs dealt only with Aetna. They went to numerous sources thereafter because of the conspiracy's serial obstruction of plaintiffs' financing negotiations (see App. 263-289). It is also a half truth (FW/MM 6) that "plaintiffs never obtained the financing they sought." Plaintiffs got a $12.5 million dollar commitment from Diversified Financial Services of America (frustrated by the refusal to extend the stipulation deadlines); a commitment from General Electric Pension Trust for the sale and leaseback as part of the Metropolitan financing (destroyed along with the Metropolitan financing), and a preliminary commitment from Baird & Warner REIT (destroyed by Marshall-Michigan's entry of judgment January 2, 1972). FW/MMs' assertion (p. 6) financing was not achieved ". . . because Juneau Square Corp.'s debts were mounting steadily" is also wrong. No lender declined financing because of alleged debts.

ing this, that is where the conspirators aimed their principal shots. Had plaintiffs obtained mortgage financing, the project would have been completed and of great value. The New York Life field man stated:

> In summary, we are offered a building with an ideal view overlooking Milwaukee Harbor surrounded by quality type anchored establishments, immediate access to the metropolitan freeway system and a very strong office market in which the subject has already enjoyed a successful penetration. The sponsorship presently has the necessary balance between expertise and capital to see the project through to successful completion. (See petition at 10).

FW/MMs' central claim of innocent motivation is supported only by self-serving statements of bank officials.[4] It conflicts with the trial court's analysis (App. 72-73) and with numerous facts: the documented agreement among the First Wisconsin companies and NML to restrain the supply of office space onto the market; First Wisconsin's reports to stockholders and the SEC saying adequate expansion space for the foreseeable future exists in the First Wisconsin Center alone; First Wisconsin's own rental studies (App. 186-187) acknowledging the adverse impact of "possible new buildings" *including Juneau Square East;* First Wisconsins's rental rates expressly predicated on *reduced* competition (App. 189-195). See trial court at App. 72, 80.

FW/MMs' argument (at 7) to disguise the competition factor (that some Juneau Square East space would be used by expansion of existing tenants in North and South[5])

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[4] No corroborating independent witness or document was produced at either trial. The assertion First Wisconsin and NML favored competitive development is without foundation.

[5] FW/MM hyperbolize (at 19) "East would be filled *largely* by existing tenants" in North and South. Only 20% of Juneau Square East's 300,000 sq. ft. was to have been so used.

is a non sequitur: if East were not built, expansion need would mean demand for space in the First Wisconsin Center. Their claim (at 8) First Wisconsin was "competing (sic) for a different class of tenants" is false. There is no relevant distinction between the tenants in First Wisconsin Center and those in Juneau Square.[6]

FW/MMs' central claim there was no evidence of anticompetitive motivation or behavior is simply false and was not accepted by either court below.

II. FW/MM MISSTATE THE OPINION OF THE TRIAL COURT

FW/MM attempt to justify the new trial decision by shuffling the trial court's treatment of the issues, to create the impression certain "make weight" arguments played a major role in the grant of a new trial. The district court's decision (App. 51-96), fairly read, plainly turns on the weight of the evidence. As to the hearsay issues emphasized by FW/MM (p. 12-15), the court of appeals recognized that even if erroneous, admission of that evidence "hardly seems sufficient to warrant a new trial" (App. 19). The other alleged grounds are upon analysis insubstantial and erroneous. See App. 290-296.

III. THE TRIAL COURT'S ERRONEOUS AND UNCONSTITUTIONAL WEIGHT OF THE EVIDENCE TEST.

This issue is fundamentally important to federal trial practice, but FW/MM evade it.

A new trial motion is unquestionably addressed to the trial court's discretion. What *standards* the trial court is to apply in exercising its discretion, however, is un-

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[6] Typical tenants for the First Wisconsin Center were: Prudential Insurance Company, Reliance Insurance Company and Youngstown Steel Products. Typical tenants for Juneau Square (North and South) were: Aetna Life Insurance Company, Travelers Insurance Company, Mutual of Omaha Insurance Co., Proctor & Gamble Distributing Co., Armor Dian, Inc. and Eli Lilly & Company.

settled. Compare 11 Wright and Miller, Fed. Prac. Proc., § 2806, p. 42; 6A Moore, Fed. Prac., §59.08[5]; 10 Cyc. Fed. Proc. (3rd edition, 1968), §3407, p. 69; *Lind* v. *Shenley Industries, Inc.*, 278 F.2d 79, 89 (3 Cir. 1959) ("There is . . . little authority on what standards are to be applied . . . [and the] . . . few available authorities are conflicting"); *Firemen's Fund Insurance Co.* v. *Aalco Wrecking Co., Inc.*, 466 F2d 179 (8 Cir. 1972). Failure to employ the correct standards in ordering a new trial is not an exercise of *sound* discretion and is ". . . subject to the correcting power of the appellate court below and this court." *Langnes* v. *Green*, 282 U.S. 531, 541-2 (1931).

The trial court should be particularly reluctant to set aside a jury's determination: First, where the only question is which witness is to be believed on a simple fact issue. *Lind* v. *Shenley Industries, Inc.*, supra. This case as a whole was complex; but the pivotal fact issue for the courts below was a simple one—did the First Wisconsin's slanderous credit report cause New York Life to decline its mortgage loan? If the jury believed the contemporaneous memorandum and accompanying Lutz testimony (App. 180-183), as well as extensive additional circumstantial evidence (App. 263-8, 276-86), plaintiffs won the issue. Second, in conspiracy cases, where plaintiffs normally *must* rely on inferences and circumstantial evidence, the proof is in hostile hands and conspirators and their friends will deny or obscure the truth. *Poller* v. *C.B.S.*, 396 U.S. 464, 473 (1962); *Interstate Circuit, Inc.* v. *U.S.*, 306 U.S. 208 (1939); Sullivan, *Antitrust* (1977), p. 312.

The court in its new trial decision engaged in an extensive "weighing of the evidence," its central ground for the new trial. (App. 82-85). In denying plaintiffs' 1292(b) motion (App. 101-3) the trial court explained how it arrived at its own verdict, so to speak, and then discarded the jury's verdict because it differed. Put another way,

the trial court did what all courts and writers condemn· substitute its judgment for that of the jury.

IV. THE COURT OF APPEALS' FAILURE TO REVIEW THE DISTRICT COURT'S WEIGHT OF THE EVIDENCE TEST AND IMPROPER USE OF A SUPPOSED INSTRUCTIONAL ERROR AS GROUNDS FOR THE NEW TRIAL.

FW/MM ignore these issues, even omitting the supposed instructional error (expressly included by the trial court) in their description of the trial court's grounds for a new trial. As set forth in our petition (at 20) this error rendered the new trial order jurisdictionally invalid.

V. SCOPE OF APPELLATE REVIEW.

The authority for differentiating in appellate review between orders granting and orders denying a new trial is not limited to "one case" (FW/MM 17), *Massey* v. *Gulf Oil Corp.*, 508 F 2d 92 (5th Cir. 1975). The Third and Eighth circuits make the same distinction. *Lind* v. *Shenley Industries,* supra (p. 90); *Firemen's Fund Insurance Co.* v. *Aalco Wrecking Co., Inc.,* supra (p. 187); see also 11 Wright and Miller, Fed. Prac. & Proc. § 2819, p. 120-1.

FW/MM then argue "nothing in the court of appeal's opinion" suggests it failed to make the distinction. To the contrary, the Seventh Circuit described its scope of appellate review here as "exceedingly limited" and relied on three cases affirming *denials* of new trial motions. App. 13.

This too is an issue of continuous and fundamental importance to federal appellate practice not yet ruled upon by this court.

VI. FACTUAL ERROR IN COURT OF APPEALS' DECISION.

Our petition (at 21-22) sets forth a factual error on a point *critical* to the court of appeals' decision: its plain mistake in confusing two exhibits. FW/MMs' brief could not and did not answer this.

VII. PROOF OF ACTUAL INJURY TO COMPETITION IS NOT AND SHOULD NOT BE REQUIRED OF PRIVATE PLAINTIFFS IN RULE OF REASON CASES.

The court of appeals' decision erects a new barrier to private antitrust actions by requiring proof defendants' conduct caused *actual* harm to competition. The court of appeals (App. 24) and FW/MM (Br. 19) rely mainly on *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 375 (1967), and *Continental T.V. Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977).

Under *Schwinn* (388 U.S. at 375), if defendants' conduct or motive is predatory, as here, inquiry as to the precise effect upon competition is unnecessary. In *Continental T.V.* (433 U.S. at 49, n. 15) this Court quoted with approval from *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918):

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as *may* suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before or after the restraint is imposed; the *nature of the restraint* and its effect, actual *or probable.* (Emphasis supplied).

Plaintiffs should thus be required to prove only *potential* injury to competition. This Court should decide this for rule of reason cases, as it has for *per se* cases, and thereby resolve the conflict this case has created between the 7th and 2nd Circuits (see P.Br. 23-24).

VIII. USE OF UNFAIR MEANS BY ONE MAJOR COMPETITOR TO ELIMINATE ANOTHER SHOULD BE ILLEGAL PER SE WHEN THE PURPOSE IS TO DESTROY COMPETITION.

Rules of *per se* illegality are appropriate for manifestly anti-competitive conduct. *Continental T.V., Inc.* v. *GTE*

Sylvania, Inc., supra. Respondents' conduct falls squarely within the definition of conduct illegal *per se*. *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 5 (1958).

There is no real risk of importing general unfair competition law into antitrust (the concern on which criticism of the so-called *Pick-Barth* cases has rested) because we are dealing here not with competition by unfair means but the elimination of competition by destruction of a major competitor through means that are unfair and without redeeming business value. The conflict among the circuits shown at pages 25-26 of the petition is very real, yet there appears to be overall approval of the use of *per se* rules in cases such as this.

Whether the *per se* rule should extend to elimination of a *potential* competitor (R.Br. 21) is not in issue. Juneau Square and First Wisconsin were actual competitors because they owned existing competing buildings and because their new buildings, though not completed, were the subject of active leasing activity and marketing. Indeed, a major competitive advantage for petitioners and fear for respondents was that Juneau Square East was to come on the market a year or more ahead of the First Wisconsin Center. App. 3-4.

The claim there was no evidence respondents intended to eliminate petitioners as competitors is specious. They *did* eliminate them, as they planned from the beginning (PX 304-App. 170-179), and produced no believable evidence of a non-anticompetitive motive for doing so, as the trial court recognized. App. 72-73.

IX. RADICAL DEPARTURES FROM PROPER JUDICIAL PROCEDURES DEPRIVED PETITIONERS OF CIVIL DUE PROCESS.

As discussed above, the hearsay/weight of the evidence reasoning on which the courts below relied to set aside

the first verdict was the product of error. The remaining grounds were purely speculative (Pet. at 27 and App. 290-296). FW/MM have not attempted to and cannot show the trial court did more than speculate as to the *possible* (but not *found* or even *likely*) existence of these factors and their impact on the jury. No actual prejudice to FW/MM was demonstrated even by them.

The verdict in the second trial[7] was the product of procedural errors of the most serious kind, including denial of cross-examination, misleading rearrangement of deposition testimony and marked favoritism in evidence rulings and time restrictions. (Petitions at 28). FW/MM have not met thees issues but—like the court of appeals—swept them under the rug of "discretion." This court should not permit such fundamental deprivation of civil due process to go unexplained and uncorrected.

X. SUSTAINING A DIRECTED VERDICT ON PETITIONERS' ATTEMPT TO MONOPOLIZE CLAIM CONFLICTS WITH RULINGS OF THIS COURT AND OF OTHER COURTS OF APPEALS.

FW/MMs' argument on this point (at 24-25) is diversionary. The issue is whether the trial court properly directed a verdict on the issue of attempt to monopolize for failure to establish defendants' exact market share (App. 30-31) when it also found that more direct evidence of monopoly power existed: defendants' present ability to charge rentals at higher than competitive rates (App. 80). The issue was not defendants' specific intent but the existence of a dangerous probability of success. The court

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[7] The petition (at 16) mistakenly states the second verdict was for the defendants "on all issues." The case was submitted to the jury on a special verdict. The jury answered only the first question (whether defendants conspired to restrain trade unreasonably) and were thus not required to answer the remaining questions. App. 248-251.

of appeals and the trial court misconstrued the meaning of the latter element.

There is considerable conflict among the circuits as to what "dangerous probability of success" means in attempt to monopolize cases. Compare the 7th Circuit's earlier ruling in *Kearney and Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F.2d 579, 598 (7 Cir. 1971), *cert. denied* 405 U.S. 1066 (1972), with *United States* v. *Empire Gas Corp.*, 537 F.2d 296 (8 Cir. 1976), *cert. denied* 429 U.S. 1122 (1977), and *Greyhound Computer Corp.* v. *IBM Corp.*, 559 F.2d 488 (9 Cir. 1977), *cert. denied* 434 U.S. 1040 (1978).

Only *Kearney and Trecker* is consistent with this Court's rejection of the "numbers" approach to market power in *United States* v. *Columbia Steel Co.*, 344 U.S. 495, 527-528 (1948), emphasizing instead the *actual or threatened* impact of the defendants' power in the relevant market.

This Court should make clear that where a defendant is in fact able to charge higher than competitive rates it is not necessary to establish its precise percentage of the market.

Respectfully submitted,

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Dated: November 14, 1980.